

No. 15,149

United States Court of Appeals
For the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,
Appellant,
vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
Deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,
Appellee.

APPELLANT'S REPLY BRIEF.

CHARLES J. CLASBY,
1000 Polaris Building, Fairbanks, Alaska,
Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,
1000 Polaris Building, Fairbanks, Alaska,
Of Counsel.

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APPELLANT'S REPLY BRIEF.

Appellee in his brief argues that the applicable measure of damages in this case is that set forth in the 1955 Alaska Wrongful Death Act, ch. 153 S.L.A. 1955; and that even if the 1955 Act is not controlling, the trial Court nevertheless applied the proper measure of damages under the 1949 Wrongful Death Act, section 61-7-3, ACLA 1949. Neither of these arguments is tenable.

I.

THE 1955 WRONGFUL DEATH ACT.

The 1955 Alaska Wrongful Death Act, c. 153, S.L.A. 1955, is not applicable to this case because of the provisions of Section 19-1-1, ACLA 1949. This section, a common type of savings statute, reads as follows:

“The . . . amendment of any statute shall not affect . . . any act done or right accruing or accrued or any action or any proceeding had or commenced prior to . . . such amendment; . . .”

And that is this case. The accident occurred October 10, 1951. This action was commenced May 21, 1953. [The action would be barred by limitations October 10, 1953]. The Act was amended *effective* June 28, 1955, [Approved March 28, 1955, and effective 90 days thereafter; Sect. 14, Organic Act 4-3-3, ACLA 1949].

The amendment came not only after an action was commenced, but after the date when the cause would otherwise have been barred by the statute of limitations. The foregoing statute is clear in its language; and applied to the facts of this case, it does, without question, bar consideration of the amendment as applicable to this action.

Following the semi-colon which ends the above quotation from Section 19-1-1, the statute deals with the release or extinguishment of a penalty, forfeiture or liability. This case involves neither the release nor the extinguishment of a penalty, forfeiture or liability and therefore this part of the savings statute is not pertinent.

Appellee relies on *United States v. Standard Oil Company of California* (S.D. Cal. N.D. 1937), 21 F. Supp. 645; aff'd (9th cir. 1940), 107 F. 2d 402. This case says that since at common law interest as an element of damage in a conversion action was discretionary with the Court, therefore a statute fixing interest from the date of conversion conferred no vested right that could not be subsequently abrogated by a statute retroactive by its terms.

At common law the right of action for injury abated upon the death of the person injured. Accordingly the right created by the statutes is to damages, and the indemnity is limited to the statutory limitation. The situation presents no comparison with that in the *Standard Oil* case (*supra*).

The situation in this case is not new. Often legislatures have raised the limits of the recovery under wrongful death acts; and the Courts have consistently refused to apply the new sum as the measure in either pending cases, or causes arising prior to the amendment.

Field v. Witt Tire Co. of Atlanta, Ga. (2d Cir. 1952), 200 Fed. 74;

Theodosia v. Keeshin Motor Express Company, Inc. (Ill. 1950), 92 N.E. 2d 794;

Keeley v. Great Northern Ry. Co. (Wisc. 1909), 121 N.W. 167 at 170.

See also Annotation: 77 A.L.R. 1338.

II.

THE 1949 WRONGFUL DEATH ACT.

Counsel for appellee criticizes the soundness of the reasoning of the Court in the *Kriedler* case (10 Alaska 365). Nonetheless that decision stands; and functioned as a judicial guide-post to the 1949 Legislature in re-enacting our Wrongful Death Act. And counsel finds Judge Dimond's instructions in the *Draille* case [Appendix B, Appellant's Brief] "Truly a paradox . . .",

However, the real paradox is the decision of the trial Court in this case, occurring at the end of nearly 55 years of settled understanding of the Act, after the reaffirmation of that understanding through the 1949 re-enactment, and acting as a preamble to legislative adoption, in 1955, of a completely different concept in the Wrongful Death Act from that then existing.

The Oregon legislature manifestly changed its Act in 1939. The Courts of Oregon could do nothing other than give significance to the intent implicit in the change. But Oregon legislative intent as found by its Courts is not binding on Alaska, and cannot be said to overrule the interpretations of the Alaska Act by the Alaska Courts, and this Circuit Court. Appellee has shown no affirmative authority supporting his interpretation of the 1949 Act.

CONCLUSION.

The position of appellant, and the authorities noted in appellant's brief, not having been effectively challenged by appellee, a reversal by this Court of the District Court's judgment should be ordered.

Respectfully submitted,

CHARLES J. CLASBY,

Attorney for Appellant.

COLLINS, CLASBY & SCZUDLO,

Of Counsel.

Service acknowledged by receipt of a copy this 29th day of October, 1956.

Robert A. Parrish,

Attorney for Appellee.